This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 2/13/02.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
WILLIAM BOYD,	)	
	)	CHARGE NO: 1999CF2093
Complainant,	)	EEOC NO: 21B991454
	)	ALS NO: S-11188
and	)	
	)	
AKIMA CORPORATION,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On October 20, 2000, Respondent filed a Motion for Summary Decision in this case. Complainant responded to the motion on November 30, 2000 and Respondent replied on December 21, 2000. The motion is now ripe for decision.

Contentions of the Parties

Respondent argues there is no genuine issue of material fact within Complainant's claim of race discrimination. Specifically, Respondent asserts it is entitled to a summary decision in its favor as a matter of law because Complainant cannot establish the elements of his *prima facie* case. Further, Respondent argues even if Complainant can establish a *prima facie* case of discrimination, he cannot establish that reducing Complainant's full-time employment to part-time employment was due to his race.

Complainant asserts Respondent is not entitled to a judgment as a matter of law because affidavits and other exhibits attached to Complainant's Response to Respondent's Motion for Summary Decision establish that Complainant was discriminated against because of his race. Primarily, Complainant argues the discriminatory animus was demonstrated when a supervisor, Jay Jackson, instructed a

selection panel to "mark him lower" than others being considered for full-time employment. Complainant alleges Mr. Jackson did this based on his race because Mr. Jackson used racial pejoratives in his presence at some time in the past.

Additionally, Complainant asserts Respondent's reason for placing Complainant in a part-time position is pretextual because Respondent did not establish that it was required to reduce the number of full-time guards under the federal contract.

Findings of Fact

The following findings of fact are not the result of a credibility determination, but are based on uncontested portions of the pleadings or affidavits made part of the record in this matter:

1. On October 1, 1998, the federal government awarded Respondent Akima Corporation a contract to provide guard services, among other things, to the Charles Melvin Price Support Center (CMPSC) in Granite City, Illinois.

2. Complainant William Boyd was employed as a full-time security guard at the CMPSC prior to Respondent securing the contract for services.

3. Complainant's race is black.

4. After Respondent secured the contact for services at CMPSC, it continued the employment of all eight security guards previously employed by the predecessor contractor but, due to a change in the federal guidelines, only had an economic need for two full-time guards.

5. In order to determine which two of the eight employees Respondent would retain as full-time security guards, it chose a selection panel consisting of three supervisors who had directly supervised the guards in the past. The panel was instructed to rate the guards on six different employment criteria: motivation, attitude, dependability, seniority, supervision required, and productivity.

6. To rate the employees on the six criteria, the panel was required to evaluate each employee and agree on a ranked number from one through eight in descending order for each employee. The best employee in each category being ranked number one.

7. The panel agreed on how to rate seven of the eight employees in each category.

8. The panel disagreed on how to rate Complainant in the category of productivity. One of the three supervisors on the panel wanted to rank Complainant higher than the other two supervisors agreed to rank him.

9. Because the panel was in disagreement over the category of Complainant's productivity, their supervisor, Jay Jackson, instructed them to accept the majority vote and rank Complainant accordingly.

10. After all employees were ranked, the panel averaged the individual employee's scores to determine a composite score for each person. The composite scores were then ranked from lowest to highest. The employees who were ranked numbers one (black male) and two (white male) on a scale of eight were chosen for the two full-time positions. The remaining six employees were offered part-time employment.

11. Complainant's average ranking was seven out of eight.

12. Even if Complainant was ranked first in the category of productivity and the successful candidate were ranked last in that category, Complainant would be tied for third place out of eight employees.

13. On October 1, 1998, Respondent continued to employ Complainant only as a part-time security guard because he was not ranked high enough by the panel to be selected for full-time employment.

14. October 31, 1999, Complainant filed a charge of discrimination with the Illinois Department of Human Rights alleging on his own behalf to have been aggrieved by practices of race discrimination prohibited by section 2-102(A) of the Illinois Human Rights Act.

Discussion

The Illinois Human Rights Act provides that a party is entitled to a summary decision "if the pleadings and affidavits…show that there is no genuine issue as to any material fact and that the moving party is entitled to a recommended order as a matter of law. " *775 ILCS 5/8-106.1.* That provision of the Act mirrors the well established procedure followed in the Illinois Circuit Courts.

In order to determine if a genuine issue of material fact exists in this case, Complainant's case must be scrutinized under a disparate treatment analysis. To succeed under that theory, Complainant must first prove a *prima facie* case of race discrimination. The burden of production then shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. If Respondent does so, then the burden shifts back to Complainant to prove that the proffered reason is merely a pretext for discrimination. *Zaderaka v. Illinois Human Rights Comm.,* 131 Ill. 2d 172, 545 N.E.2d 684, 137 Ill. Dec. 31(1989).

In general, the *prima facie* case for disparate treatment based on race is: 1) Complainant is a member of a protected class, 2) Complainant was performing his job consistent with Respondent's legitimate expectations, 3) Complainant suffered an adverse employment action, 4) similarly situated persons who are not members of Complainant's protected class were treated better than Complainant or Complainant was replaced by someone who was not a member of his protected class. *Triplett and City of Chicago, Department of Revenue,* 1991CF339, 1996 ILHUM LEXIS 4(1996) citing, *Taborn and State of Illinois, Department of Corrections*, 14 Ill. HRC Rep. 374, 386-387(1984).

Complainant can easily establish the first prong of his *prima facie* case because Respondent admitted in its answer to the complaint that Complainant is black. He could also arguably establish the second and third prong of his case because he was

performing the job of a full-time security guard and was moved to part-time status under a subsequent contractor. Finally, Complainant can establish fourth prong of his case because one of the two successful candidates chosen for one of the two full-time job openings was a white male, John Fagala.

Although, Complainant may be able to sufficiently establish a *prima facie* case of race discrimination to overcome a motion for summary decision, his case would fail on the issue of pretext. Respondent articulated a legitimate business reason for retaining only two full-time guard positions. That reason was the federal guidelines only required Respondent to employ two full-time guards in order to procure and maintain the contract. As a result, Respondent chose to operate CMPSC under the minimum requirements of the contract.

It is well established that the Commission cannot second guess a business decision made by an employer as long as the decision is not discriminatory. *Garner and IDOT,* 1996 ILHUM LEXIS 170 (1996). The decision to place Complainant in part-time employment was clearly not discriminatory. Respondent decided to maintain all eight of the guards employed by the previous contractor. Therefore, to determine which two guards out of the eight currently employed by CMPSC were best qualified for the two full-time positions, Respondent established a method of ranking employees on a scale of one to eight.

Respondent chose six categories it determined to be important in order for the candidates to be qualified for the job. It then assigned a panel of three guard supervisors to rate the eight existing full-time security guards. To avoid any improprieties, Respondent required all three panel members to be in agreement with each score assigned to an employee. They were in agreement with each employee's score in every category except Complainant's score for "productivity." Therefore, the panel's supervisor, Jay Jackson, instructed them to take a majority vote and assign

Complainant the majority score. The two individuals who received the highest scores were retained as full-time guards. The top scorer was a black male and the second best scorer was a white male. Five other white employees were also placed in part-time security guard positions, as was Complainant.

In order to prove Respondent's articulated reason was merely a pretext for discrimination, Complainant would have to show that he would have been offered full-time employment if he had not been marked lower in the area of productivity because he was black. This is because the only alleged defect in the hiring process Complainant takes issue with is that Jay Jackson instructed others to mark him lower in the area of productivity because of his race, and that but for this discriminatory act he would have been offered full-time employment.

Without establishing the truth of whether or not Complainant was marked lower at Jay Jackson's insistence, I hypothetically assigned Complainant the best possible score he could have received in the productivity category and recalculated the employees' scores. As it happened, originally John Fagala scored first in productivity and received an overall rank of second out of eight. Accordingly, he received one of the two available positions.

However, if I remove the alleged discriminatory animus that resulted in Complainant being ranked poorly in the productivity category, assign him the best possible score of one and Mr. Fagala the lowest possible score of eight, Complainant's ranking moves up considerably on the scale to tie for third place. Even assigning Complainant the best score and Mr. Fagala the worst score, Complainant would still not be ranked one or two and would not qualify to receive the position of full-time employment. Only those employees who ranked one or two were offered full-time employment. Accordingly, Complainant cannot show he did not receive the full-time

position with Respondent because of his race and his claim of discrimination fails on the issue of pretext.

It should be noted that in his Reply to the Motion for Summary Decision Complainant goes to great lengths to attack the subjective criteria the panel used in selecting the two employees for continued full-time employment. While it can be argued that some of the criteria used were subjective, it cannot be said that the use of those criteria make the selection method inherently discriminatory.

In order to establish that Respondent's selection method was facially neutral but inherently discriminatory, Complainant would have to show that the employment practice operated to exclude people from a protected class. *Moore and City of Mount Vernon*, 1982SF0153, 1995 IL HUM LEXIS 736 (1995). Complainant could not possibly make that showing in this case because the individual who scored highest and received a full-time position was Joe Roberts, a black male. As Respondent pointed out, the Commission noted in *Garner and IDOT,* 1996 ILHUM LEXIS 170 (1996) that, "it is reasonable to view such a fact that a white interviewer ranked another black applicant highest of all the candidates as evidence that Complainant's race was irrelevant to the [employment] decision in question." *Id* at 30. Accordingly, for all the foregoing reasons, Respondent's motion must be granted.

Conclusions of Law and Determination

1. Respondent, Akima Corporation, is an "employer" within the meaning of the Illinois Human Rights Act and is subject to the provisions of the Act. *775 ILCS 5/1-101et seq.*

2. Complainant William Boyd is an "employee" within the meaning of the Illinois Human Rights Act and as such is protected by the provisions of the Act. *775 ILCS 5/1-101et seq.*

3. Complainant William Boyd cannot establish the necessary element of pretext needed to prove he was discriminated against on the basis of his race by Respondent Akima Corporation.

4. In the pleadings and affidavits before me, no genuine issue of material fact exists between the parties on the issue of whether Complainant William Boyd was entitled to one of two available full-time jobs with Respondent Akima Corporation. Therefore, pursuant to *775 ILCS 5/8-106.1*, Respondent Akima Corporation is entitled to a recommended order as a matter of law.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission grant Respondent's Motion for Summary Decision. I further recommend that the complaint, together with the underlying charge, number 1999CF2093, be dismissed with prejudice.

ILLINOIS HUMAN RIGHTS COMMISSION

KELLI L. GIDCUMB
Administrative Law Judge
Administrative Law Section

ENTERED THIS 26th DAY OF OCTOBER , 2001.